SUPREME COURT, U. S.

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No. 1291

In the Supreme Court of the United States

OCTOBER TERM, 1968

STATE OF LOUISIANA,
Respondent,

v.

JOHN T. HOPPER AND JOE A. WOODARD,
Defendants-Petitioners.

STATE OF LOUISIANA'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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STATE OF LOUISIANA'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Respondent hereby moves this Honorable Court to dismiss the petition for a writ of certiorari to the Supreme Court of the State of Louisiana entered in the above entitled case.

OPPOSITION TO PETITION FOR CERTIORARI

Respondent, the State of Louisiana, pursuant to Rule 24 of the Revised Rules of the Supreme Court of the United States opposes the petition of John T. Hopper and Joe A. Woodard, filed herein for a writ of certiorari to the Supreme Court of Louisiana on the ground that the petition does not raise a substantial federal question. Petitioners' convictions of manslaughter resulted only after full compliance of the requirements of Louisiana and Federal law, and

neither petitioners suffered a violation of any constitutional or statutory right. No issue of a substantial federal question, not previously decided by this Honorable Court, was raised or determined by the Supreme Court of Louisiana in the instant case. Nor has such an issue been decided in any manner at variance with the decisions of this Honorable Court.

I. OPINION BELOW

The opinion of the Louisiana Supreme Court is reported in *State of Louisiana v. John T. Hopper and Joe A. Woodard*, 251 La. 77, 203 So.2d 222 (1967) and is reproduced in petitioners' application as appendix A.

STATEMENT OF FACTS

The Defendants, John T. Hopper and Joe A. Woodard, were tried for the murder of Joseph Ralph Beeson on April 19, 1964 in Avoyelles Parish, Louisiana by beating the said Joseph Ralph Beeson to death.

The two Defendants were college students in Ruston, Louisiana. The Defendants left college in Ruston on April 18, 1964 in the company of one R. W. Frazier and Charlie Gaharan and traveled by an automobile owned and operated by one of the Defendants, Joe A. Woodard toward Marksville, in Avoyelles Parish. They checked in at the Ranch House Motel, which is located on Louisiana Highway 1. Shortly thereafter they made an appearance at the Pelican Club

in Marksville (at about 8:00 P.M.) where they participated in the entertainment and activity offered by the club until about 1:30 A. M. on April 19, 1964. When the band had stopped playing, the Defendants walked out of the Club and the decedent, Joseph Ralph Beeson, was among them. Upon reaching the Northeast corner of the club, and about midway to the East side of a concrete slab where a red panel truck was parked, an argument ensued between the Defendant, John T. Hopper and the decedent, Joseph Ralph Beeson. The argument became heated and the decedent Beeson found himself surrounded by Defendants Hopper and Woodard who weigh approximately 180 pounds and 215 pounds respectively, and who started to move in on the decedent Beeson, who weighed approximately 141 pounds. In attempting flight, the decedent threw a high ball glass at the Defendant Hopper, but before he could escape, he was seized and held from the rear by the Defendant Woodard, permitting Hopper to strike Beeson about the face and chest area until he was knocked senseless. Beeson was then thrown to the ground and both Defendants, Woodard and Hopper proceeded to beat, kick and stomp the life out of the helpless and defenseless Beeson. Upon seeing blood flow from the nose, mouth and ears of Beeson, the Defendants ran from the area. Woodard ran to his automobile, parked nearby, and Hopper called to Billy Frazier to get Charlie Gaharan who was still in the Pelican Club. The four drove off and returned to the Ranch House Motel, driving in a

long round about way in fear of pursuit.

Two friends of Beeson, Winston Miller and Jerry Morrison, who had been waiting for Beeson then realized that he was involved in an altercation with Hopper and Woodard. They attempted to assist their friend but were stopped momentarily by Charlie Frazier, who was about 75 feet away from the scene of the altercation. After being delayed momentarily by Frazier, Miller and Morrison arrived on the scene and found Joseph Ralph Beeson in the condition stated above. Jerry Morrison got the license number of the escaping automobile which was subsequently traced and determined to be owned by one of the Defendants, Woodard. The police arrived and although suspecting that Beeson was already dead, he was sent to the Marksville Hospital where his death was confirmed.

After determining the ownership of the automobile and the motel in which the owner was staying, police chief Dubea and officer DeNux of the Marksville police knocked on the slightly open door of cabin 9, opposite to where Woodard's automobile was parked. The officers were invited in, whereupon Woodard admitted that he owned the automobile, that he had been to the Pelican Club and had been in a fight. Chief Dubea then informed Woodard that the boy had died and Woodard's response was "I knew we had given him a good beating, but I didn't think we had killed him." Chief Dubea then advised Woodard that he was under arrest and to go along with him, where they were taken to the Avoyelles Parish Sheriff's office. Chief Dubea and Deputy

Sheriff Bordelon returned to the Motel to pick up Hopper. However, two State Troopers, Pat Lemoin and Eddie Bordelon had already picked up the radio call and arrived at the Ranch House Motel, found Hopper and informed him that the Beeson boy was dead. Hopper's response was "My God, what have we done". The State Troopers had taken Hopper in custody and brought him to the Sheriff's office in Marksville. En route to the Sheriff's office, the Defendant Hopper, told the officers that they had killed Beeson, "I guess, because we were drinking". Oral confessions were made by both Defendants which were offered and admitted into evidence.

On April 21, 1964 the Defendants were released on Bond. On May 22, 1964 the Grand Jury indicted the Defendants for murder and the trial of this cause commenced in June of 1965. The jury returned a verdict of manslaughter as to both defendants on July 16, 1965 and were each sentenced to fifty-nine months at hard labor on August 19, 1965.

Defendants appealed to the Supreme Court of Louisiana on November 2, 1965. The Louisiana Supreme Court upheld the conviction of Defendants in an opinion rendered June 5, 1967. Application for a rehearing was denied. Petition for writ of certiorari was docketed in this Honorable Court on April 4, 1968.

Response to Petitioners' Part I. Prosecutor's Conduct

To paraphrase the almost Petitioners' own words, what is involved here is the credibility of the witness,

Rev. Bell and the question of the alleged suppression of evidence by the prosecution.

Rev. John E Bell, a Methodist Minister of the Gospel, visited the Parish Jail on the morning of April 20, 1964 and testified before the Jury that during a conversation between the Defendants and an unidentified third person he heard defendant Woodard make the statement "I wish to hell I had time to stomp some more to death". Petitioners contend that Rev. Bell could not have seen or identified the petitioner Woodard because of physical conditions of the jail, and more particularly, the cell involved, and whether there were or were not toilets in the cell during the time the defendants were there incarcerated. Further, the cell door was to have been kept closed at all times.

Petitioners supposedly learned, subsequent to the trial, that insofar as the toilets were concerned, the toilets were in the cell in which the defendants were confined at the time of Rev. Bell's visit to the jail.

Petitioners urges that this complaint became aggravated when the District Attorney referred to Rev. Bell's testimony in his closing-rebuttal argument and when defendants were subsequently denied a motion for a new trial; that Defendants rights were denied under the Fourteenth Amendment. To lend support to petitioners' argument, petitioners call attention to the fact that the prosecutor displayed to the jury clothing of one defendant and a model, both of which had theretofore been excluded from the evidence; that

the District Attorney was a witness and testified several times during the trial; and that the Prosecutor declined to testify when he was called by the defendants in connection with the hearing on the Motion to Supress—all to show that "the prosecutor had a personal interest in the prosecution in conflict with the fair administration of justice".

Petitioners fail to note, however, in their "Statement of Facts" that Rev. Bell was subjected to cross-examination; that other witnesses testified as to the steel doors, grill work and maximum security policies of the jail; that on motion of the defense, the pertinent cell was viewed by the jury; and not the least important, the unidentified party referred to by Rev. Bell, happened to be one Billy Frazier, who was called by the defense and who testified that he did not hear the statement attributed to defendant Woodard. Therefore, contradictory testimony was much in evidence, and the question resolves itself merely to the credibility of the witnesses and the weight of the evidence in connection therewith as determined by the jury.

As to the suppression of evidence by the prosecution, that it had knowledge that the toilets were removed from the cell in which defendants were confined subsequent to the visit to the jail by Rev. Bell is certainly not borne out by the record in this case. It is submitted this contention is supported by the stipulation made between the defense and the prosecution at the time of defendants' motion for a new trial.

The stipulation referred to is quoted below as noted in the Opinion of the Supreme Court of Louisiana (Application A-74):

> "It is stipulated between the defense and the prosecution that there were toilet facilities in the cell occupied by the defendants on April 19, 20th and 21st, 1964 and that these facilities were removed some time-short time prior to the trial and in 1965."

Therefore, it is submitted that the action of the District Attorney is clearly without that conduct proscribed by *Brady v. Maryland*, 373 U.S. 83, 87 and *Ashley v. Texas*, 310 F. 2d. 80, 83, relied upon by petitioners. Nor did the prosecuting attorney allow the question of whether there were or were not toilets in defendant's cell at the time of Rev. Bell's visit to go uncorrected. *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173.

Petitioners show that the jury was permitted to inspect the maximum security cell and by way of criticism called attention to this Honorable Court that "the two defendants, however, were not present at this time and therefore did not see what the jury had seen". What petitioners failed to note is that the jury view was made at the urging of petitioners who shared in the conditions under which the jury view was permitted by the Court. Counsel for defendants did not request or suggest as a condition that the defendants view the cell in the company of the jury. In fact it is submitted that the per curiam by the trial judge clearly illustrates the concern of the Court for

the proper conduct of the trial, as quoted in full by the Louisiana Supreme Court in its opinion (Application A-76) which we quote here in part:

> "REASON: We were operating in crowded quarters. The Court wanted to keep the jury separate and apart from the defendants and the courtroom spectators. The narrow stairways, crowded jail, etc. would have made it impossible to separate the jury from the defendants. All the sheriff's force, except two deputies were under the rule as witnesses in the case and this was the only way the visits could be arranged. The problems involved were pointed out to the attorneys by the Court, at the bench, privately, before the viewing visits, and all agreed to same as proposed, beforehand, and without objection".

Petitioners' criticism of the remarks to the jury made by the District Attorney when referring to a certain model is raised for the first time in their Application. It is submitted that the objection and request of defense counsel to instruct the jury to disregard the said remarks was immediately recognized by the Trial Court when it observed:

> "That's true, gentlemen, you are to disregard the statement, Only the evidence that is admitted in the case is to be considered by you. The statement here about the exhibit that he withdrew from the evidence is not to be given any consideration whatsoever." (See record, p. 3748-3749):

As to the clothing of one defendant displayed to the jury in connection with the questioning of a witness, the witness Mr. Frazier was asked, "Mr.

Frazier, are these the pants and shirt that Joe Woodard was wearing that night?" Counsel for defendants immediately objected and the State withdrew the evidence, the jury was retired and counsel argued about the evidence, it being the contention of defense counsel that the clothing had already been excluded by the Court as evidence as a result of which he moved for a mistrial which was denied by the Trial Court. At page 3713 of the transcript of Vol. 17 the defense counsel stated as follows:

> "Your Honor, in your per curiam may I suggest that your Honor indicate the manner which these were presented to the jury. They were not in a sealed package of any kind".

The Court had previously excluded a sealed package as evidence. To the statement made by defendants' counsel, the Court replied as follows, quoting from the same page: (Application A-61.)

> "Yes, sir, I will have to because I can say in the presence of the jury, you intimated that's the same ones I had excluded and certainly I had no way of knowing that—maybe they are and maybe they are not—I wouldn't say that in front of the jury, but I can say it here and I will make the proper notation when the per curiam is prepared in connection with the Bill. Yes, sir."

If there was no per curiam attached to the Bill of Exception, the Supreme Court noted in its opinion that the trial judge properly instructed the jury.

As stated heretofore, petitioners attempt to show

"personal interest in the prosecution" because of the fact that the District Attorney testified as a witness several times for the State.

The Supreme Court of Louisiana, considering the Bill of Exceptions relating thereto, found no prejudice, or reversible error, quoting in part from the Court's opinion (Application A-45):

> "Under the facts of this prosecution as disclosed by the testimony attached to the bills of exceptions, it was necessary that the District Attorney testify. He had a peculiar knowledge of what took place on the morning the offense was committed. It was really necessary that he testify in order for the defendants to have a fair and impartial trial. A foundation was properly laid for the introduction of exhibits. We also find that the testimony of the District Attorney was explanatory rather than impeaching. With respect to Bill of Exceptions No. 48, we note that the trial judge explicitly told the jury to disregard completely certain testimony which was sought to be elicited in rebuttal."
>
> "We find that the trial judge had to exercise his discretion in this matter, and under its peculiar facts and circumstances he was constrained to permit the District Attorney to testify. We do not find that he abused his discretion. No authority which absolutely prohibits a district attorney from testifying in a prosecution which he is conducting has been pointed out to us. Counsel for the defendants have not shown that defendants suffered any prejudice from the testimony of the District Attorney. We find no reversible error".

It is submitted that a prosecuting attorney is competent to testify in the discretion of the Court.

Pribyl v. State, 87 N.W. 2d 201, 185 Neb. 691; *Clark v. State*, 370, P. 2d 46, (Oklahoma); *State v. Lyle*, 125 S. Carolina, 406, 118, S. E. 803; *Robertson v. Commonwealth*, 269 Kentucky 317; 107 S. W. 2d 292; *State v. Aguirre* 167 Kansas 266, 206 P. 2d 118; *Maund v. State*, 254 Alabama 452, 48 So. 2d 553; *State v. Stiltner*, 61 Wash. 2d 102, 377 P. 2d 252; *Mertler v. State*, 97 N.E. 2d 492 (Indiana)

The following cases cited by petitioners have no application here: In *State v. Davis*, 164 So. 2d 589, the District Attorney was merely a spectator at a trial until he testified as a witness: in *Macon v. Commonwealth* 46 S.E. 2d 396 the District Attorney was criticized by his method of questioning; in *Jenkins v. State*, 136 So. 2d 580, it appears that the District Attorney was *the* prosecuting witness.

It is submitted, that the rulings of the trial court permitting the District Attorney to testify as a witness in those instances criticized by petitioners were a just and proper exercise of the discretionary powers of the trial judge, and were not prejudicial to the constitutional rights of the defendants, and were properly affirmed by the Louisiana Supreme Court.

Response to Petitioners' Part II. Severance

Petitioners acknowledge that at the time of trial of the defendants Louisiana law provided in LRS-15:316:

> "Persons jointly indicted shall be jointly tried, unless the District Attorneys elect to place such persons separately upon trial, or unless the Court, on motion of defendant, shall, after a hearing contradictory with the District Attorney, order a severance."

In the State of Louisiana severance is not a matter of right and the granting or refusing of severance is vested in the sole discretion of the trial judge whose ruling will not be interferred with unless manifestly erroneous and injurious to the accused. *State v. Progue*, 243 La. 337, 144 So. 2d 352 (1962) and *State v. Mack* 243 La. 369, 144 So. 2d 262 (1962). Cert. denied by the United States Supreme Court, 83 S. Ct. 1306, 373 U.S. 917, 10 L. Ed. 2d 416.

The Louisiana Supreme Court in its opinion (Application A-32 & A-33) held as follows:

> "The reasons set out by counsel for the defendants for the granting of severance were general. At the time the motions were filed, defendants did not show any particular reason for granting severance or that injury would result to either from a joint trial. They did not show with particularity that their defenses were antagonistic; they did not show that their testimony would be contradictory. See *State v. Progue*, 243 La. 337, 144 So. 2d 352. They did not meet the tests which would necessitate severance. See LSA-R.S. 15:316-317.
>
> "We find no abuse of discretion by the trial judge. His charge to the jury adequately protected each defendant. We do not find (and it

has not been shown) that either defendant was arbitrarily affected by the ruling of the trial judge, or that either actually suffered any prejudice from the joint trial itself."

As a footnote to its holding, the Supreme Court listed several instructions to the jury pertinent thereto, which are quoted herein below (Application A-33):

"8. 'All evidence relating to any oral admission or oral confessions or other incriminating statements claimed to have been made by a defendant, outside of Court, should be considered with caution and weighed with great care. And, you, Gentlemen, must be convinced beyond all reasonable doubt that such were freely and voluntarily given.

' * * * *

'And, in the case of a confession, made outside of Court, by one defendant, it should not be considered by the jury as evidence against the other defendant who was not present or not a party to such confession.

' * * * * *

'Although there are two defendants and they are jointly charged with the same crime, it is your duty, Gentlemen, of the Jury, to give separate personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence shows with respect to that individual, leaving out of consideration, entirely, any evidence admitted solely against some other defendant, each defendant is entitled to have his case determined from his own acts and state-

ments, and the other evidence in the case as may be applicable to him.' "

Petitioners rely principally on the California Supreme Court citing *People v. Aranda*, 12 Cal. 2d 307, 83 P 2d 928 (Application P. 51) but it should be noted that that Court recognized that the rules created therein were not constitutionally compelled because of the absence of a prior holding by the United States Supreme Court, but that their holding was to be considered "judicially declared rules of practice."

The *Jackson v. Denno* case, 378 U. S. 368 (1964) held that a defendant was constitutionally entitled to have a trial judge determine that his confession was voluntary before it was submitted to the trial jury. This practice has long been followed in the State of Louisiana. Petitioners claim that the denial of severance and the introduction of each co-defendants' statements in the course of the trial amounted to a denial of defendants' right of confrontation and cross-examination of a witness under oath in Court. Petitioners cite *Pointer v. State of Texas*, 380 U. S. 400, 403, 85 S. Ct. 1065, 1068, 13 L.Ed. 2d 923; *Brookhart v. Janis*, 384 U. S. 1, 3, 86, S.Ct. 1245, 1246, 16 L.Ed. 2d 314; and *Smith v. State of Illinois*, ... U. S. ....., 88 S.Ct. 748 (1968). However, the *Pointer* case was concerned with the use of a transcript of a witness' testimony at a preliminary hearing; the *Brookhart* case concerns the unusual facts where a defendant did not plead guilty but was alleged to have agreed not to cross-examine

or otherwise challenge any of the State's case; the *Smith* case concerns the testimony of an informer in a narcotics case where this Honorable Court held that the right of cross-examination included the right to ask the informer's correct name and address. None of which we submit have application here.

It is submitted that the holding by the Louisiana Supreme Court is consistent with *Dellipaoli v. United States*, 352 U. S. 232 (1957) where this Honorable Court held that the right of severance rests in the broad discretion of the trial court.

And concluding, petitioners' concern over the confusion of the jury has been answered by Your Honors in *Opper v. United States*, 384 U. S. 84, 75 S. Ct. 158 as follows:

> "Other than the general possibility of confusion, he (defendant) points out nothing specifically prejudicial resulting from the joint trial . . .
>
> "To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict."

Response to Part III. Unreasonable and Unconnected Interception of Conversation

The statement, to the effect, quote, "I wish to hell I had had time to stomp some more to death" attributed to Woodard as part of the testimony overheard by Rev. Bell is criticized on the grounds that it is fragmentary and not an entire statement and

thus prejudicial to the defendants, citing L.R.S. 15:450 which is as follows:

> "Every confession, admission, or declaration sought to be used against anyone must be used in its entirety so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford."

The statement in the instant case is not a fragmentary remark as was found in *State v. Hughes*, 29 La. Ann. 514, but that the statement is complete in itself.

> "The rule as we understand it, is that fragmentary passages of a conversation are excluded, but that a statement in regard to a conversation, which is complete in itself, heard by the witness, is admissible in evidence. The requirement is that the statement given must be complete in itself. It matters not whether it be the whole or only a part of the conversation." *State v. Garon*, 161 La. 867, 109 So. 530 (1926) citing *State v. Fontenot*, 48 La. Ann. 283, 19 So. 113; *State v. Foster*, 153 La. 154, 94 So. 536.

Continuing, the following authorities are also presented: *State v. Corneille*, 153 La. 929, 96 So. 813 (1923); *State v. McCollum*, 135 La. 432, 65 So. 2d 600 (1914); *State v. Spillers*, 105 La. 163, 29 So. 480.

The Louisiana Supreme Court noted in its Opinion (Application A) that the statement by Rev. Bell

was not incomplete but that it expressed a complete thought. The Court also noted that a witness called by the defense, one Billy Frazier, who was the unidentified person referred to by Rev. Bell testified that he did not hear Joe Woodard make the statement attributed to him by Rev. Bell and that therefore the jury had for consideration, the testimony of Frazier and Rev. Bell which was contradictory and defense counsel have not specifically shown the Court how the defendant suffered such prejudice as would warrant reversal. Petitioner also avers that his rights under the Escobedo and Miranda decisions were violated; that he intended his conversation to be private; and that he did not waive his constitutional right to be secured against unreasonable searches or surveillance during his incarceration.

Petitioners rely on *Massiah v. United States*, 377 U.S. 207, 84 S. Ct. 1199 (1964). There the Court held that the petitioner was denied basic rights when federal agents had deliberately elicited words from him after he had been indicted in the absence of counsel and was critical of indirect or supreptitious interrogations, citing a New York case, *People v. Waterman*, 9 N.Y. 2d. 561, 565; 216 N.Y. S 2d 70, 75; 175 NE 2d 445, 448 which critized "secret interrogation". Another case cited by petitioners *Katz v. United States*, 88 S. Ct. 507 (1967) excluded electronically recorded statements of the accused stating that wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.

It is submitted that in the instant case, Rev. Bell was not a spy or an agent for the government nor was he interrogating the defendant.

It is submitted that the statement by Rev. Bell attributed to defendant Woodard but denied by witness, Billy Frazier, resolves itself to a determination of fact as made by the jury and that no federal questions are here involved.

Response to Part IV. Confessions

A. The first issues raised by petitioners in this part relate to the illegality of the arrest of the petitioners. It is respectfully submitted that the following facts, proved and of record, show clearly that their arrest was legal.

Petitioners contend that they were arrested without warrant or probable cause. The State concedes that a warrant was not issued for their arrest but contends that the facts as revealed by the testimony establish without equivocation that the arrest of petitioners was made under circumstances which would warrant a man of reasonable caution to believe that a felony had been committed and that the petitioners were the perpetrators thereof.

The first news of the offense was received by Reese McNeal, Chief Paul Dubea and Officer DeNux who were in the Sheriff's radio room where Chief Dubea received a call which advised him that a boy had been run over at the Pelican Club and was in serious condition. Whereupon they called for an ambulance and Chief Dubeau and Officer DeNux pro-

ceeded to the Pelican Club. (R. pp. 610-611) On arriving at the club they found a boy lying on a concrete slab in a pool of blood and they were of the opinion that he was probably dead at that time. There was a crowd gathered around and, from the conversation of the members of the crowd, as well as from their own observations, Chief Dubea determined that the boy had been injured as a result of a fight (R. pp. 647, 650, 652). One of the onlookers told Chief Dubea that she had seen three boys jump into a car and leave the scene of the offense. She was able to provide Chief Dubea with the make and color of the automobile as well as the license number thereof (R. pp. 612 and 613).

The two officers left the scene and went to the hospital where it was determined that the boy was dead (R. p. 615). Leaving the hospital, they returned to the Sheriff's Office where they obtained from the State Police the name of the owner of the suspected vehicle (R. p. 616). From the Sheriff's Office they proceeded to the Ranch House Motel where they found, parked, the automobile described by the witness at the scene of the incident. On inspection they found that there was blood in the car. (R. p. 618) There was a small crowd of angry people around the motel. Whereupon they dispersed the crowd, knocked on the door and were admitted in to the motel room (R. p. 620). Upon being admitted to the motel room, Chief Dubea and Officer DeNux found three males and one female present. What occurred is shown by the testimony of Chief Dubea:

"When I knocked they say come on in, we walked in, I don't know who said come in but anyway we walked in and I says 'Mr. Woodard in this room?' and he says 'that's me', he did he was still in bed.

"I said 'is that your car outside?' he said 'yes, sir' I said 'were you in a fight at the Pelican?' he said, 'yes, sir', well I said 'the boy that you all the fight with, he's dead' well he said 'we knew we had give him a good beating but we didn't know we had killed him' I says 'you are under arrest' and one of them says 'what for' and I said 'for murder'. So we come up to the sheriff's office, I brought Woodard, Frazier, what's this other guy's name—*this fellow was married, for*get his name—had his wife, him and his wife, Nobel, well we just brought those three. Hopper, which we later on found out . . . ." (R. p. 621)

The above sets forth the factual situation regarding the arrest of petitioner, Woodard.

Petitioner, Hopper, was also arrested the same night under the following circumstances.

Sergeant Patrick Lemoine and Trooper Eddie Bordelon of the State Police had received a message to be on the lookout for an automobile of the make, color and license number of the vehicle belonging to Woodard. They testified that they understood that the occupants of said vehicle were being hunted because of a murder charge. These officers did not immediately join in the hunt since they were investigating an accident. In the course of investigating an accident, they went to the Marksville Hospital

(R. pp. 775 and 776). While at the hospital they were approached by two boys who advised them that several of the persons involved in the killing had been apprehended at the Ranch House Motel; however, one of the boys involved was still in the motel room (R. pp. 777 and 778). The troopers proceeded then to the motel and found the defendant Hopper in the room. The following is the conversation between Hopper and the officers:

"Q. Now, what Mr. Lemoine, did you first say to him? Who spoke first when you got in, you or him?

"A. I don't recall. I do remember asking him if he was one of the subjects involved in the incident at the Pelican Club, referring to a fight. You want me to proceed, sir?

"Q. Yes.

"A. He did answer he was one of them. I asked him if there was anyone else in the room with him. He said, no, there was not and I then told him that he was under arrest and I would carry him over to the courthouse.

"Q. Did you at that time tell him what he was arrested for?

"A. I told him that the city officers and parish officers wanted him for murder." (R. p. 781)

After the arrest of Hopper, he was taken by the officers to the Sheriff's Office, turned over to the local law enforcement officials and the State Police officers went off duty. This narrative of the events surrounding the arrest was corroborated by Trooper Eddie Bordelon (R. pp. 801-809).

From a review of the cases cited by petitioners, as well as those of *State v. Green*, 150 So.2d 571, 244 La. 80; *State v. Marchetti*, 173 So.2d 531, 247 La. 649; it is evident that the arresting officers are placed in the position of "the reasonable man", taking into consideration the probabilities and practical considerations of every day life on which reasonable men could reasonably be expected to act. *Brinegar v. U.S.*, 338 U.S. 160; *State v. Bourg*, 248 La. 844, 182 So.2d 510 (1966); *State v. Johnson*, 249 La. 950, 192 So.2d 135 (1966).

The State is firmly convinced that under the facts and circumstances set forth, any officer would have proceeded to make the arrest, certain that a felony had been committed and that the defendants were involved in the commission thereof. In view of the above the arrest certainly was not an illegal one. Comprehensive review of this issue was made by the Supreme Court of Louisiana which found no basis for petitioners complaint of illegal arrests. See Application, A-14—20.

B. Petitioners next allege that they were denied their statutory and constitutional rights regarding the legality of their detention, regarding an effective warning about their right to have and secure counsel, and their right to remain silent.

Once again, the facts proved and of record, simply do not support petitioners' position. The record shows that Chief Dubea and Sgt. Lemoine made clear to petitioners that they were under arrest for murder.

See quoted material in part "A", *supra*. The petitioners were booked within twelve hours of their arrest. They were indicted by the grand jury almost within a month of the homicide and thereafter ordered held without bail. "Their confinement was therefore at all times legal confinement". Supreme Court of Louisiana, Application A-31.

Petitioners' suggestion that Louisiana has adopted the McNabb-Mallory rule is nothing short of preposterous. The only case cited for such a proposition is *State v. Davidson*, 248 La. 161, 177 So. 2d 273 (1965). That case held that, there then being no statutory procedural vehicle for raising the issue of illegally obtained evidence (*Mapp v. Ohio*, 367 U. S. 643 (1961), Louisiana would follow the Federal procedural precedent of a pre-trial motion to suppress, unless surprise or lack of opportunity were present. *Davidson* had nothing to do with the legality of a detention. However, the recent case of *State v. Johnson*, 249 La. 950, 192 So. 2d 135 (1966) did. It should also be noted that *Johnson* cited with approval *State v. Marchetti*, 247 La. 649, 173 So. 2d 531 (1965) which rejected the proposition that the *McNabb* rule was Louisiana's law or was required of Louisiana's law.

Prior to any interrogation of the petitioners in the instant case, it was made clear to each of them that they had a right to counsel, that they had a right to *call* counsel, and that they had a right to remain silent, but that, if they did make any statements, such could be used against them. See the pertinent testi-

mony set out in Application, A-21-28. As summarized by the Supreme Court of Louisiana at Application A-31, there is no evidence that either petitioner, before or after the warning, requested counsel or the right to secure counsel. There is no evidence that they had counsel present during the interrogation who was not allowed to serve them. There was no showing that the petitioners requested to use the telephone nor that they were refused its use. See Application A-31.

It is respectfully submitted that the Louisiana Supreme Court properly applied the holdings of *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U. S. 436, 86 S.Ct. 1602 (1966); and *Johnson v. State of New Jersey*, 384 U. S. 719, 86 S.Ct. 1772 (1966). Although it is respectfully submitted that the facts of the instant case would stand the test of *Miranda*, under the *Johnson* holding, only the test of *Escobedo* must be met and it was clearly met. This case was tried in June of 1965. *Johnson* made it clear that *Miranda* applies only to cases beginning after June 20, 1966. At 384 U.S. 721, the Court stated:

> "In this case we are called upon to determine whether *Escobedo v. State of Illinois* . . . and *Miranda v. State of Arizona* . . . should be applied retroactively. We hold that *Escobedo* affects only those cases in which the trial began after June 22, 1964, the date of that decision. We hold further that *Miranda* applies only to cases in which the trial began after the date of our decision one week ago." (References omitted)

The reasons for this ruling are amply detailed

in the Court's opinion, the primary reason being to effect the orderly administration of justice:

> "At the same time, retroactive application of *Escbedo* and *Miranda* would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional safeguards. . . . 384 U.S. 731."

The Louisiana Supreme Court reviewed in detail the facts surrounding the confessions or admissions of the petitioners and found nothing to support their present contention that the confessions were involuntary. Application A-20-32. Neither petitioner was questioned extensively. Neither was mistreated. Neither was in a state which precluded a voluntary statement. Both were calm and coherent. Both were wholly advised as to their legal rights to remain silent and to all of their other rights, discussed above. Both were of at least average intelligence and were students in college. Both elected to make statements. It is respectfully submitted that these statements were perfectly proper and unquestionably admissible in evidence.

Petitioners' exhaustive research and citation of numerous cases cannot cure the basic defect in their position: the facts simply are not as they allege.

Response to Petitioners' Part V. Comulative Error

As the first of the alleged comulative errors, petitioners argue that the admission in evidence of color slides of the autopsy made by one Dr. John B.

Maxwell, the pathologist who made the autopsy, was prejudicial to the right of the defendants to receive a fair trial and listed eight exceptions as indicated on page 83 of petitioners' brief.

Generally speaking, the objection is based on the fact that the defense stipulated that Ralph Beeson, the decedent, died from trauma to the brain incidental to a basal fracture of the skull; that the color slides were gruesome and offered probative value but all to only prejudice the jury.

In support of petitioners' contention citing *State v. Morris*, 245 La. 175, 157 So. 2d 728 (1963) and *State v. Morgan*, 211 La. 572, 30 So. 2d 434 (1947), it is submitted that the test regarding the admissibility of photographs of a victim is as stated in *State v. Hamilton*, 249 La. 392, 187 So. 2d 417 (1966), at page 421.

> "The fact that objects or photographs constitute or portray a repulsive spectacle and tend to prejudice the jury furnishes no valid ground for their exclusion where they are otherwise relevant. *State v. Ross*, 217 La. 837, 47 So. 2d 559 (1950); *State v. Morgan*, 211 La. 572, 30 So. 2d 434 (1957). Such evidence is admissible if offered to furnish a description of the wound or to shed light on any issue. *State v. Eubanks*, 240 La. 552, 124 So. 2d 543 (1960); 2 Wharton, Criminal Evidence, Sec. 686 (12th ed. 1955)".

In the *Morris* case, the photographs were ruled inadmissible for reasons not present in the instant case. The Court there found their relevancy overwhelmed by their gruesomeness. There, the defen-

dant had been convicted of murder for the shooting of his victim and that certain of the pictures introduced unnecessarily showed the coroner holding various organs inside the bloody incision of the victim at autopsy; the only issue was whether the defendant had killed intentionally or in the heat of passion.

Unlike the *Morris* case, the instant case involves a killing by beating where the State had the burden of proving beyond a reasonable doubt that the defendants specifically intended to inflict serious bodily harm upon the decedent victim. L.R.S. 14:30. The color slides were clearly relevant to that issue so that the jury might properly assess the intent from the severity of the wounds. The then applicable L.R.S. 15:441 defined relevant evidence as that which tends to show ". . . the commission of the offense and the intent . . .". Further, L.R.S. 15:445 provided that the intent ". . . may be inferred from the circumstances of the transaction". No such fact was at issue in the *Morris* case where an inherently lethal weapon, a gun, was the instrument of the killing.

Further, the mere stipulations by defense counsel that the decedent victim died by trauma to the brain and that decedent died by reason or causes related by Dr. Maxwell in response to his questioning, in no way renders the slides irrelevant. Such stipulations fall short of giving the jury an adequate idea of the number and severity of the wounds and the intent of the defendants to inflict serious bodily harm.

In the *Morgan* case, the only reasons advanced

for admitting gruesome photographs of the decedent victim, where the instrument of the killing was a shotgun, was to prove the corpus delicti, and to show the nature, scope and extent of the wounds. It is submitted there could have been no doubt as to the intent to inflict great bodily harm where a shotgun is used, unlike the instant case where the victim died by a beating and where the State must prove beyond a reasonable doubt the specific intent to inflict great bodily harm.

It should be noted that the trial judge allowed a full argument on the admissibility of the slides outside of the hearing of the jury and viewed the slides himself prior to ruling on their admissibility.

It is further submitted that the admissibility vel non of such pictures or slides rests in the sound discretion of the Trial Judge. *State v. Fulghum*, 242 La. 767, 138 So. 2d 569 (1962), app. dism. 371 U.S. 5 (1962).

Petitioners object to the fact that a jury view of a truck and a jury view of the cell block, heretofore referred to in our brief, out of the presence of defendants, was prejudicial to the defendants and that the right of the defendants to be present at the viewing could not be waived expressly or impliedly by defendants' counsel.

It is noted in the opinion of the Supreme Court that the viewing of the truck and the cell block was at the request of defendants' counsel (Application

A-70—A-72). On two occasions the Louisiana Supreme Court in its opinion quotes defense counsel's statements to the effect that the truck was brought next to the Courthouse for the purpose of the jury seeing it. In response to the request by counsel for the defendants, the Court called counsel to the bench to discuss the conditions for the viewing by the jury. The defendants did not ask that they be present during the viewing by the jury. The Trial Judge specifically states that the defendants and other spectators looked through the windows of the Courtroom and watched the examination of the truck on the parking lot down stairs. As to the jail cells, the Louisiana Supreme Court noted that the defendants were present when all testimony was induced relative thereto, and that the defendants themselves occupied the cell on April 20, 1964.

The per curiam by the Trial Judge relative to the jury viewing is quoted in full as follows (Application A-75);

> "This bill refers to the jury viewing the truck offered in evidence and a certain jail cell in the Parish Jail, without being accompanied by the defendants. No objection was made at the time; counsel for defendants waived their clients' presence. Counsel for defendants wanted the jury to go see the truck parked outside the Courthouse, on the Courthouse parking lot. The Courtroom is on the third floor. The Court called a conference of the District Attorney and counsel for defendants. I stated that if we could agree on when

this would be done and who was to go with the jury, I would arrange a visit to the truck, on the parking lot, by the jury. The attorneys for both sides were called up to my desk. It was agreed that just before the noon recess, the jury, the attorneys for both sides, the Court, the Clerk of Court and the deputies in charge of the jury would walk down the stairs and view the truck. It was further agreed that all others, spectators, etc., would be removed from the area; that there was to be no talking or questions asked about the case or about the truck. That after viewing the truck in this manner, the jury would be released to the Sheriff's custody for their noon day meal, without returning to the Courtroom. It is the Court's recollection *that the defendants* and other spectators *looked through the windows of the Courtroom to watch the examination of the truck on the parking lot downstairs.*

"As for the jail cell, the same procedure was followed. Attorneys for both sides were called to the bench and agreed to let the jury go upstairs (4th floor) from the 3rd floor, without the defendants accompanying them, but with the attorneys, the Court, the deputies in charge and the clerk. They were to march or walk up a stairway and there was to be no questioning or testimonh of any kind during the visit.

"On both occasions, Court was recessed for the purpose and on both occasions the procedure was agreed to by the attorney for the defendants and the District Attorney and never was there any objection to the procedure by anyone. The matter was raised for the first time in the Motion for a New Trial.

"REASON: We were operating in crowed quarters. The Court wanted to keep the jury separate and apart from the defendants and the courtroom spectators. The narrow stairways, crowded jail, etc., would have made it impossible to separate the jury from the defendants. All the sheriff's force, except two deputies were under the rule as witnesses in the case and this was the only way the visits could be arranged. The problems involved were pointed out to the attorneys by the Court, at the bench, privately, before the viewing visits, and all agreed as proposed, beforehand, and without objection." (Emphasis ours)

The Louisiana Supreme Court, in its opinion (Application A-74-75) noted the cases, *State v. Furtrell*, 159 La. 1093, 106 So. 651; *State v. Pepper*, 189 La. 795, 180 So. 640; and *State v. Breedlove*, 199 La. 965, 7 So. 21 221 cited by petitioners and concluded:

"Since the appearance of the jail cell and its viewing had to do with the credibility of the witnessess as to their recollection of the cells physical conditions, we find that defendants were not prejudiced by not being present at the inspection. The viewing of the cell had nothing to do with examining the scene of the commission of the crime or with evidence associated with the commission thereof. We conclude that the presence of the defendants was not necessary and the rule that one who is tried for a felony must be personally present in Court at every important stage of the trial from the moment of his ar-

raignment to his sentence was not violated herein."

Petitioners admit on p. 30 and p. 90 of their brief that ordinarily the failure of the defendants to be present at the two views by the jury might be of no significance except for the fact of the remarks by the District Attorney in his closing-rebuttal argument which heretofore has been referred to on p. ..... of our brief.

Immediately upon objection by defense counsel, the trial judge instructed the jury as follows (Application A-68):

> "You gentlemen of the jury will disregard that statement as to pictures you did not see. Any evidence that was excluded during the process of this trial are not to be considered by you in any manner, shape or form and the statement of the District Attorney is (inaudible)—they are to be disregarded by you. The Court will deny of course, the motion for a mistrial in view of this statement to disregard."

The Louisiana Supreme Court in its opinion (Application A-68) notes that:

> "The general rule is that instruction of the Court at the proper time nullifies the prejudicial effect of the improper statement made by tne prosecuting officer during the course of the trial." Citing *State v. Dowdy*, 217 La. 773, 47 So. 2d 497.

Petitioners in conclusion argue that the "totality of the circumstances" warrant the imposition by this

Honorable Court of the McNabb-Mallory rule, petitioners avering:

> "The Courts' below never determined upon the evidence as a whole and its entirety that the defendants had a fair trial but rather they determined or concluded that as to each error the Courts did not find prejudice to the defendants." (Application p. 91).

It is submitted in conclusion that it is inconceivable indeed to proceed through a trial of many weeks duration as in the instant case, where certain errors made by both counsel for prosecution and counsel for the defendants would not have to be corrected by the Trial Court.

The Louisiana Supreme Court in its opinion (Application A-62) notes:

> "The jurisprudence is legion that generally instructions of the Trial Court at proper times nullify the prejudicial effect of an improper statement made by a prosecuting officer during the course of trial."
>
> Citing *State v. Dowdy*, 217 La. 773, 47 So. 2d 496; *State v. Brazile*, 234 La. 145, 99 So. 2d 62; *State v. Brossette*, 229 La. 420, 86 So. 2d 87; *State v. Jackson*, 227 La. 642, So. 2d 105.

CONCLUSION

In view of the foregoing facts of record and in view of the foregoing precedents, it is respectfully submitted that the petitioners present no substantial federal question for the decision of this Court and that

the petition should be dismissed and the decree of the Supreme Court of Louisiana should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William P. Schuler, a member of the Bar of the United States Supreme Court, do hereby certify that a true and correct copy of the foregoing opposition to petition for writ of certiorari has been served on petitioners, John T. Hopper and Joe A. Woodard, by placing a copy of the same in the United States Mail this date, postage prepaid, and properly addressed to their counsel of record as follows:

Camile F. Gravel, Jr., Esquire
611 Murray Street
Alexandria, Louisiana 71301

New Orleans, Louisiana, this ..... day of ....., 1968.